IN THE

Supreme Court of the United States.

October Term, 1965

No. 1085

IKE DOVBERG AND MAURICE DOVBERG, INDIVIDUALLY AND T/A PASTE COMPANY OF AMERICA,
Petitioners,

v.

PENNSYLVANIA PASTE COMPANY; AND SAMUEL SCHULTZ, ADA SCHULTZ, MARVIN L. SPIRO AND ISADORE KAPLAN, INDIVIDUALLY AND TRADING AS SAMUEL SCHULTZ & CO., A PARTNERSHIP,
Respondents.[1]

BRIEF FOR RESPONDENT SAMUEL SCHULTZ & CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The trial judge's Order and Direction for Judgment, filed November 7, 1962, which sets forth in detail his reasons for granting judgment under Fed. R. Civ. P. 50(b), was not reported, and was not printed or otherwise reproduced by the petitioners. For the convenience of the Court it is printed at the end of this Brief in Opposition as an Appendix.

The opinion of the Court of Appeals is reported at 353 F. 2d 963.

1. The caption of the case appearing on the Petition for a Writ of Certiorari is inaccurate. Dow Chemical Company was not a party in the Court of Appeals and is not a party in this Court. The only remaining parties respondent are those indicated in the caption herein. However, since Pennsylvania Paste Company was put out of business by the destruction of its credit when judgment was entered against it, Schultz & Co. is actually the only respondent in the case.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 3, 1965. Jurisdiction of this Court is based on 62 Stat. 928, c. 646, 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Where the evidence discloses only that a retailer ceased to deal with the petitioners, who were manufacturers, and dealt instead, on better terms, with another manufacturer who was in competition with them, did petitioners' evidence of their threats to hold the retailer responsible for harm to them which might arise from his "joining an effort" to hurt their business support an inference that, solely by virtue of such threats, the retailer's cessation of dealings with petitioners was transformed into a conspiracy in violation of Section 1 of the Sherman Act?

2. May the value of a business be shown by the answer to a hypothetical question relating to a theoretical business which assumes a volume of production beyond the capacity of the particular business to create and a market for such a volume which does not exist?

STATUTES INVOLVED.

Section 1 of the Sherman Act, c. 647, 26 Stat. 209, 15 U. S. C. § 1, in relevant part provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

Section 4 of the Clayton Act, c. 323, 38 Stat. 731, 15 U. S. C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Section 4B of the Clayton Act, c. 283, 69 Stat. 283, 15 U. S. C. § 15b, provides:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

STATEMENT OF THE CASE.

On September 28, 1958, petitioners brought suit under the Sherman Act, and claimed that Dow Chemical Company and eighteen other defendants, individuals, firms and corporations, had conspired together to put petitioners out of business. As discovery progressed petitioners gradually dropped their claims against all defendants except Dow Chemical Company; Pennsylvania Paste Company; Samuel Schultz, Ada Schultz, Marvin Spiro and Isadore Kaplan, individually and trading as Samuel Schultz & Co.; Reba Spivak, individually and trading as Atlas Wallpaper & Paint Co.; and Samuel Milkis, individually and trading as Empire Wallpaper & Paint Co. The trial judge dismissed the claim against Empire, and the jury exonerated the Dow Chemical Company and Atlas. Only Samuel Schultz & Co. (Schultz) and Pennsylvania Paste Company (Papco) remained, and the verdict was against them alone.

After a painstaking review of the record the trial judge determined that there was no probative evidence linking Schultz conspiratorily with Papco and that, whatever petitioners' competitor Papco may have done, Schultz was not shown to have had any part in it. He accordingly entered judgment for the defendants n.o.v. for the reasons stated in his opinion[2] (3b), but in addition alternatively granted a new trial because of the deliberately false testimony and intentional confusion which characterized the petitioners' case (4b).[3]

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2. The opinion of the trial judge, which was called "Order and Direction for Judgment," was not included in petitioners' appendix nor was it even referred to in the section of the petition entitled "Opinions Below" (Petition, page 2). It has, however, been printed as an appendix to this brief.

3. Cf. pages 31-2 of petitioners' brief where they say:

"There was evidence (N. T. 303, 933-940, 2491, 2582, 4040, 4062) that the Schultz firm, like Papco and other retailers to whom Papco sold Liqui-Size, blatantly represented the product as being Nix-Size, or being the same thing as Nix-Size, when it was resold to the public, but that this practice was not character-

Petitioners offered no evidence of any conversations or meetings between the respondents or of any agreement or understanding indicating a purpose to injure petitioners' business.[4] Each of the respondents categorically denied any such conduct or any purpose to put petitioners out of business, and respondent Schultz, as a retailer, had no possible reason to seek to destroy an alternate source of his own supply for the benefit of another, and competing, manufacturer. Actually the amount of business done by Schultz with petitioners was so small it could only be a matter of complete indifference to Schultz whether petitioners were in business or not.

Petitioners' case is based wholly upon the theory that a violation of section 1 of the Sherman Act may be inferred from the fact that in 1951 Schultz believed that

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istic of those who marketed other products which competed with Nix-Size."

N. T. 303 relates to what Philadelphia Wallpaper Co. did in December, 1950; N. T. 933-40 relates to what the proprietor of the Germantown Wallpaper Company said about Papco on June 28, 1954 and what the proprietor of the Brenner Wallpaper Co. said about Papco on June 11, 1952 and March 11, 1955; N. T. 2491 relates to the wording of the label used by Papco; N. T. 2582 relates to what Papco did. In none of them is there any reference to Schultz. N. T. 4040, if it refers to a man named Levy, relates to what some one told Levy in November, 1956 (N. T. 4035), several months after petitioners had ceased to make Nix-Size (Exs. P-234, P-238). If it refers to a man named Applebaum it relates to what Applebaum did on March 24, 1958 (N. T. 4046), more than a year after petitioners were out of business (N. T. 1155) and when there was no longer any demand for their products (N. T. 1160). In none of the citations was there any reference to any practice of those who marketed other products which competed with Nix-Size.

4. Thus during the course of Dovberg's deposition, a portion of which was read into the record as a part of the evidence offered by Dow, but not transcribed, counsel for the petitioners said (Dep. T. 121) "If you just want to know if they (the respondents) actually met, I think his answer is 'no', and we are frank to admit we don't have any evidence that these people actually met and conspired as such. All we can do is draw our conclusions."

Dovberg himself said: "I am not guessing. I—I feel there is conspiracy."

petitioners' competitor, Papco, had the capacity to put them out of business; that in 1952, after having been told by petitioners that Papco was trying to put them out of business, Schultz stopped buying Nix-Size, a product manufactured by petitioners and, even after being threatened by petitioners if he did so, bought instead a substitute made and sold more cheaply by Papco; and because of events which took place after petitioners stopped manufacturing Nix-Size and after they were out of business.

Schultz, whose major business was the sale of wallpaper, incidentally sold a small amount of allied products such as paste and wall size eliminator, and was a customer, not a competitor, of petitioners. He bought some samples of wet paste from petitioners for $30.40 (N. T. 474-5) in 1950.[5] Thereafter he bought none from either petitioners or Papco (N. T. 3095-6; P. T.[6] B-23) and continued to buy wet paste from Pennock (P. T. B-23) and dry paste from Hoyt (P. T. B-66), both of them being competitors both of petitioners and of Papco. In November, 1951 Schultz told petitioners that Papco could put them out of the wet paste business (N. T. 475-6, 480-1). Petitioners had stopped manufacturing wet paste in the spring of 1951 (N. T. 1045, 1098),[7] but there was no evidence that Schultz knew why or that he had ever had any other connection with petitioners' or Papco's activities in wet paste.

A year later, in March, 1952 Schultz stopped buying Nix-Size, a wall size eliminator made by petitioners, because petitioners were slow in deliveries, made split deliveries, had raised their price above that of a like product made by Papco (P. T. B-35-41,-58,-63, D-115; N. T. 423-4,

5. This was supposed to have made Papco "gunning mad" (N. T. 475), not " 'gunning' for" as state at page 31 of the petition.

6. "P. T." designates the portion of the record contained in the "Partial Transcripts."

7. The petition suggests, page 44, "that the campaign was pressed because petitioners continued to manufacture some *wet* paste." See also Petition, pages 46-7. However, petitioner Maurice Dovberg testified that he "couldn't continue to take those losses" (N. T. 238)

574, 2844-5, 3009), and refused to package it under Schultz's trade name (P. T. B-43, -120) as Papco had agreed to do. Petitioner Maurice Dovberg claims that he then told Schultz on March 13, 1952 that he would hold him responsible if he "did anything in joining an effort, combined, to hurt our business" (N. T. 550). On the same day he wrote a complaining letter to Schultz in which, however, there was no reference to any alleged purpose to put petitioners out of business (Ex. P-106; N. T. 552-4); nor was there in a like letter dated June 29, 1953 (Ex. P-110; N. T. 575-8).

There was no suggestion of a conspiracy or of any agreement or understanding between either of the respondents that led Schultz to stop buying from petitioners and buy instead from Papco, with which he was also in competition in the sale of paste (P. T. B-66). He didn't know (P. T. B-67) and had no possible way of knowing if Papco was selling at a profit or a loss, or if Papco was selling "solely to hurt petitioners" or "solely to destroy petitioners' business;"[8] and there was no evidence that the change was made by Schultz for any other than the purely business reasons of better deliveries, lower price and brand label packaging (N. T. 423-4, 574, 2844-5, 3009, P. T. B-36-41,-58,-63) and petitioners' eccentric behavior (P. T. B-57, E-30).

The only other evidence from which the petitioners suggest that a conspiracy between Schultz and Papco might be inferred is some testimony of events which transpired in 1956, which was the last year that, according to petitioners' Exs. P-56 and P-429, Nix-Size was sold, and events transpiring in 1957 when Nix-Size was no longer being made, and in 1958 when it had been off the market for at

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and discontinued sales of wet paste in 1951 (N. T. 1045); that there "might have been occasions . . . where possibly as an accommodation I might have filled some small orders but we were actually out of the wet paste business . . . since the spring of 1951" (N. T. 1098). Thereafter they sold it only on request "as an accommodation for a while" (N. T. 2427-8).

8. Petition, pages 30 and 39.

least a year. Certain of Dovberg's relatives made sample purchases sometime in June of 1956 (P. T. 4197, 4213, 4355, 4358), in 1957 (P. T. 4173), and in the fall of 1958 (P. T. 3454-6), of which petitioners complain. On March 24, 1958 fifteen stores were visited (P. T. 4046, 4053). Since 1958 was a year after petitioners were completely out of business, and 1957 and June of 1956 were both after petitioners had stopped trying to manufacture Nix-Size, nothing done then could have harmed petitioners or helped to put them out of business. They were already out of business when these events are supposed to have occurred.

Petitioners' bank credit was gone (N. T. 1005-6), they were "on the brink of collapse" (N. T. 446) and hopelessly insolvent in 1955 (P-317), and could not even then accept orders unless they received cash with the order (Plaintiffs' Pretrial Statement of Contentions, p. 12; Exs. P-170, P-175, P-176, P-181, P-184). This continued into 1956 (Exs. P-212, P-219, P-224, P-231, P-232, P-233, P-234, P-238), the last year Nix-Size was sold (Exs. P-56, P-429). Early in 1957 petitioner stopped all pretense of being in business (N. T. 773, 998, 1155).

The volume of business alleged to have been lost by Schultz's conduct is insignificant. The Nix-Size purchased by Schultz from petitioners averaged a little over $100 a month (Exs. P-100, D-278 Schultz). When Schultz bought Papco's product it amounted to about $1200 in 1952 and thereafter averaged slightly over $50 a month (D-278 Schultz). It was these trifling purchases that constitutes petitioners' evidence of injury by the respondents that they claim may be interpreted as indicating a purpose to put them out of business.[9] However, in the autumn of 1952 Schultz was still advertising petitioners' Nix-Size (Ex. P-99, N. T. 562, 564) and while Schultz was supposed to be

9. Petitioners professed to find a like ulterior motive in defendant Atlas' termination of purchases from them in 1953 even though its resultant dealings with its supposed co-conspirator, Papco, amounted to only $32.40 (Ex. D-244—Atlas).

conspiring to put petitioners out of business he was paying their bills immediately upon receipt and substantially before they were due so as to give petitioners the cash they so badly needed (Ex. D-129 Schultz, N. T. 3137-41). This seemed even to petitioners to be an effort on the part of Schultz to help them (N. T. 3142).

Petitioners' contentions cannot be viewed in their true light without some understanding of the nature of petitioners' operations.

The petitioner, Ike Dovberg was a paperhanger without education or business experience. His son, Maurice, finished the eleventh grade but his business experience didn't include manufacturing or having anything to do with running a business (N. T. 1214-39), and his ideas of credit were gained from lending the price of admission to movie patrons where he worked (N. T. 1231-2). In total ignorance of the problems attending running a manufacturing business (N. T. 1593-5) Maurice got a cousin to finance them with $15,000 [10] (N. T. 68-71, 1121-2), bought a small building at 728 S. Marshall Street, Philadelphia, and called it a factory, got some machinery and started to manufacture wall paper paste and Nix-Size, a wall size eliminator. After spending $4,000 for a building (N. T. 78) and $5,000 for sugar (N. T. 2086), in addition to other initial expenditures, they never had enough cash to operate with and were in trouble from the very beginning (N. T. 1024, 2226). They were "in dire need of money" as early as 1951 (N. T. 1804-8, 3454-2, 3454-17), had to borrow even then (N. T. 3454-4, 3454-5, 4171-2, 4201), sought to make all their purchases on credit (N. T. 734-7, 1546-9, 1557, 1586-92, 1627-31, 1747-9, 2246-51; Exs. P-164, P-281, P-281a,

10. It was impossible to determine how much money was ever put in the business because of the inaccurate records kept by petitioners. The ledger, Ex. P-243, did not accurately show the condition of the business. Many loans made to it were never recorded and items were given different values at different times throughout the trial (Ex. P-24, N. T. 118-9, 1121-6, 1130-1, 1141, 1146-7, 1282-97, 1990-1, 2225-6, 3454-4, 3454-5, 4172-2, 4201).

P-289), tried to get credit from their principal supplier, The Dow Chemical Co., in an amount twice their original capital and more than the aggregate of all loans obtained from The Broad Street Trust Co. in four years (N. T. 1830-3; Ex. P-188), but gave bad checks to Dow (N. T. 1024-7, 1808-13) and to their distributor, Hoyt (N. T. 870).

Having no experience in determining costs they had no idea what it actually cost to produce the products they were selling. They didn't even know the nature of their competitors' products (N. T. 603-4, 1437-9, 1520-31, 1537-8, 1919a, 1980, 2140-2, 2214-5, 2266-8, 4675-88) or whether their own costs were prohibitive in competition with other products on the market. They began to lose business as early as 1950 (N. T. 268-9, 1397, 1435), sold at a loss, had "no money" (N. T. 201, 204) and were in financial difficulty in 1952 (Ex. D-Dow 1; N. T. 452-4, 456, 1172-5, 1991-2), pledged themselves to lose money (N. T. 553, 1454-7) and did so consistently (N. T. 1789-94, 1839-40, 1983), cutting their own prices to meet their competitors' irrespective of their economic ability to do so (N. T. 718-20, 728-30, 1018-9, 1456, 1983, 2121-2, 2202-15, 2277-80, 3558-63). They gave their customers unlimited credit (N. T. 1587-92, 3118), but knew nothing of their own capital requirements (N. T. 1593-5, 3558-63). They sold below cost as early as 1952 (Ex. D-Dow 1; N. T. 1352-9, 3558-63) and even said that this was done in an effort to increase their volume in the hope that this would enable them to get credit (N. T. 1091, 4574, 4667).

There was no evidence that they ever made any money from any sales, they kept no production records (N. T. 3242) and did not know how to take a year-end inventory (N. T. 3615). Petitioners' hopeless financial status appears clearly from a series of exhibits (Exs. D-Dow 6 to 77; N. T. 1663-1808). Although they wanted to buy on credit their financial condition was so bad they would not give Dun & Bradstreet any data and refused the numerous requests from their distributor, Hoyt, for financial information after giving him an inaccurate financial statement as of Decem-

ber 31, 1951 (N. T. 887-8, 1598-1604, 1606-9, 1676-80, 1773-4, 1781-3, 2017-8; Exs. D-Dow 6 and 66).

Until 1954 petitioners were able to obtain some modest bank credit from the Broad Street Trust Co. (Ex. P-188; N. T. 907-9, 1005) by giving a false statement of assets, and a small amount from Central-Penn National Bank (Ex. P-189; N. T. 910-3), likewise by giving a false income statement (N. T. 3607-9). When this was withdrawn they borrowed all they could get from other members of the family (N. T. 2225-6) and when this was gone they went out of business, blaming their difficulties on the refusal of Dow and Hoyt to extend them credit (Exs. P-158, P-175, D-Dow 78, 272, 273, 210, and 211; N. T. 879, 880, 957, 961, 983-4, 1007-8, 2121-2, 2194-5, 2200), not on anything Schultz had done. Petitioners' "business was beset with trouble right from the start" (N. T. 2226) and its collapse was inevitable because petitioners were without knowledge of even the most elementary and fundamental principles of business operation. There was no evidence that the petitioners ever did or ever could have run a successful business.

ARGUMENT.

The only question presented in this case is whether the District judge was justified in finding and correctly found that the evidence in the case did not establish a proper basis for a finding of conspiracy under the Sherman Act. The decision of this question turns on the particular facts involved. No general principle is in controversy; the disputed issue relates merely to the application of well settled rules to the circumstances of this particular case. No matter of general importance is involved, nor is a review required in order to secure uniformity of decision. The case is accordingly not one appropriate for review by this Court even if the decision below were wrong. *Houston Oil Co. v. Goodrich,* 245 U. S. 440 (1918); *Rice v. Sioux City Cemetery,* 349 U. S. 70, 74, 79, n. 2 (1955). Actually, however, it was correct.

There Was No Evidence of a Conspiracy.

Essentially, all that petitioners' argument amounts to is that a competitor, Papco, was trying to put them out of business, that Schultz had known a year or two before that Papco had wanted to put petitioners out of the wet paste business and knew that petitioners were claiming that it was trying to put them out of business generally, and accordingly that Schultz was obliged to continue to deal with petitioners to the exclusion of Papco and could not buy from Papco without becoming a conspirator with it. Having threatened to hold Schultz responsible if he presumed to stop buying petitioners' product and bought Papco's product instead, petitioners now claim that the jury should be permitted to find that Schultz's refusal to boycott Papco at petitioners' request constituted evidence of a conspiracy under the Sherman Act to harm petitioners. This in effect is a claim that a customer of a manufacturer who is engaged in a price war with a competitor may buy from the competitor only at the peril of being held a conspirator.

His careful re-reading of the record (1b, 3b) made clear to Judge Leahy that the bulk of the great mass of evidence related to parties who were no longer in the case and that an analysis of the deliberately false and confusing testimony offered by the petitioners (4b) showed that there was no probative evidence supporting petitioners' claim,[11] merely the fanciful suspicions of the proprietors of an unsuccessful business, who were seeking an excuse for their failure other than their own inexperience and poor business judgment.

Nowhere is there any suggestion of when the supposed conspiracy began. All that happened in 1950 was Schultz failing to sell Nix-Size at the fair trade price and in 1951 rebottling Nix-Size and selling it under his own brand name and telling petitioners that Papco could put them out of the wet paste business. All that happened in 1952 was petitioners' threatening Schultz that if he stopped buying from them and bought from Papco instead they would hold him responsible, and Schultz ignoring the threat and buying a cheaper competitive product from Papco because petitioners made slow and split deliveries, had raised their prices, refused to package under Schultz's brand name and behaved in an odd manner. Papco's prices were lower, they used Schultz's brand name and made unit deliveries. However, all that may have occurred in 1950, 1951 and 1952 was more than four years before the suit was brought in 1958. What happened in 1956, 1957 and 1958, while within the statutory period, was all after petitioners had ceased to make Nix-Size. They were for all practical purposes out of business in 1956 (N. T. 1838-9), and in 1957 and 1958 actually so, and thus the events complained of during those years could not possibly have harmed them.

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11. The petition, page 36, states that the trial judge assigned two reasons for his final judgment. Actually there were seven (3b-4b). What petitioner states to be "The second reason" (Petition, page 37) is actually the second and third (3b), and although the quotation is ascribed to "App. 17a" nothing like it appears on that page. Even the dissenting opinion below misstated (16a-17a) the basis for the judgment n.o.v. (3b-4b).

In their argument petitioners emphasize the activities of Papco to which they objected,[12] ignoring the fact that it was a competitor of theirs, selling both paste and a wall size eliminator. However, the efforts to connect Schultz improperly with any of Papco's activities likewise ignores petitioners' inability either to help or to harm Schultz and thus the absence of any possible gain to Schultz from petitioners' disappearance,[13] petitioners' unsatisfactory deliveries and price increases and Papco's willingness to sell at a lower price and under Schultz's brand name. It also ignores, as does the dissenting opinion below, the time when the early events complained of occurred, and the obvious impossibility of events occurring in 1956, 1957 and 1958 having any adverse effect whatever on petitioners.

Petitioners also complain (Petition, pages 54, 55), as does the dissenting opinion (35a), that Judge Leahy changed his mind after the verdict. This he was certainly entitled to do and it became obvious to him that he should when his prolonged study of the record made it possible to relate significant events to one another in their proper chronological sequence. This showed that as of the time the various events complained of by the petitioners took place they could not have been the basis for any legitimate inference of conspiracy. It showed that Schultz had nothing to do with the fuss about wet paste in 1950 and 1951 and that he continued to buy all his wet and dry paste from Pennock and Hoyt, who were competitors of Papco. It showed that any supposed price cutting or rebottling in 1951 was not related in any way to Papco and that in spite of their contentions, petitioners continued to sell to Schultz as if nothing had happened (N. T. 3099-3100). It showed that petitioners claim to have made a case for themselves by telling Schultz that Papco was trying to put them out

12. These were of no interest whatever to Schultz.

13. The statement (Petition, Page 29) that "Samuel Schultz had become disenchanted and angry with petitioners" is pure invention, as is the statement (Petition, page 58) that "Schultz wished to hurt petitioners."

of business and that if Schultz dared to stop buying Nix-Size from petitioners and bought instead from Papco, that would be joining in a conspiracy with Papco to harm petitioners. It showed that the only acts complained of that occurred within four years of the suit were after petitioners had become "unable to meet current orders," [14] had stopped making Nix-Size or had actually closed their business, and therefore that they could not possibly have done petitioners any harm. It showed that the dollar volume of Schultz's business lost by petitioners to Papco averaged slightly over $50 per month. It showed that at the time of their failure petitioners blamed it on their distributor Hoyt and Dow Chemical Company [15] because they had refused to extend petitioners any more credit. It showed that the keystone of petitioners' case was their demand in 1952 that Schultz refuse to buy from Papco (N. T. 550) and their two letters (N. T. 552-4 and 575-8); and that all other complaints relating to Schultz were both secondary and unsubstantial. And it also showed that placing events in their proper relative positions in terms of time and mutual relationships, and so to be able properly to evaluate their significance, had been made most difficult by the studied effort of the petitioners throughout the trial to confuse and deceive (4b, 5b-8b, 9b, 12b).

The false testimony and confusion, that added enormously to the length of the trial and the size of the record, and the time intervals between the receipt of the various bits and pieces of evidence, made it impossible even for the trial judge to unscramble them and put them in proper perspective in the time available to him at the end of the plaintiffs' case (102a). The prolonged and careful analysis that he gave the whole record after the case was over, however, led him inevitably to revise the initial impressions set forth in his interlocutory opinion (37a) and to state his final

14. Plaintiffs' Pretrial Statement of Contentions, p. 12.

15. Indeed Dow was the petitioners' principal target throughout the trial.

conclusions in the order of November 7 (1b). Instead of relying on the record or on Judge Leahy's opinion entering judgment n.o.v., which they failed to print, petitioners base their statements now primarily on Judge Leahy's preliminary and interlocutory review of the evidence, which he was compelled to revise after his final review of the entire record.

There Was No Competent Evidence of Damage.

The only evidence of damage offered by petitioners as a measure of their loss was the testimony of C. H. Darby, an engineer, who was called to give an expert opinion of value. On the basis of the assumptions which he was asked to make by petitioners' counsel (P. T. L-128), and on which he relied exclusively (P. T. L-120-1,-163), he concluded that the petitioners had a business which, at the end of 1954, was worth between $75,000 and $100,000 (P. T. L-70). However, Darby's testimony makes it quite clear that this valuation was not of petitioners' business, The Paste Company of America (P. T. L-100), operated by the Dovbergs (P. T. L-289), but of a purely hypothetical business that had gross annual sales of the product manufactured, whatever it was (P. T. L-136), of $150,000, a gross income before taxes of $15,000 and a net income after taxes of $10,000 (P. T. L-71-2, -103,-106,-206). He merely assumed, because he was asked to do so, that the imagined business made a hypothetical 10% profit (P. T. L-93), but this was wholly unrelated to the petitioners' capacity to produce a like amount (P. T. L-102-3) or to any profit that they had ever made or could ever make.

Darby's opinion of value also presupposed that the business would start right off making $150,000 in the year 1955 (P. T. L-125), but at the same time he admitted that if gross annual sales were only $17,000 instead of $150,000, the business would be worth only the value of its net assets, whatever they were (P. T. L-86-7,-237-8). Actually he conceded that on the financial facts developed by the peti-

tioners' evidence the petitioners' business was insolvent as early as 1950 and continued so (P. T. L-233-236). See also Exs. P-242 and 242A and P. T. L-282.

Petitioners' business never made as much as $17,000 in any year of its existence (Ex. P-56) and in 1954 its gross business amounted to $11,000. The theoretical $150,000 was a gross that petitioners could never have obtained. It was arrived at by assuming a capacity to produce sixty-five gross of pints of Nix-Size a week for fifty-two weeks of every year (P. T. L-51) and to sell the entire production at $48 per gross (P. T. L-54), neither of which assumptions was justified by the record. There was no evidence in the case to suggest that there was a market in which anyone could introduce and sell 65 gross of pints of Nix-Size every week, or even that that much was consumed in the entire United States. The largest amount ever sold by petitioners in a year was $13,028.58 (P-56; N. T. 397) and by its competitor, Papco, $7,332.82 (N. T. 397-8).

Hypothetical questions must be based upon facts appearing in the record. This is true in both state and federal courts: *Kale v. Douthitt,* 274 F. 2d 476, 482, 483 (4th Cir. 1960); *Rennekamp v. Blair,* 375 Pa. 620, 628 (1954). The answer to the hypothetical question which was asked Darby should accordingly not have been allowed (P. T. L-57-69) or should have been stricken (P. T. L-290-1). Darby's opinion is simply meaningless, and since this is all that the petitioners offered to show their measure of damage, and since they conceded that there was nothing else available, the judgment n.o.v. was proper for a reason in addition to those given by the court below. *Flintkote Company v. Lysfjord,* 246 F. 2d 368 (9th Cir. 1957), cert. denied 355 U. S. 835; *Wolf v. National Lead Co.,* 225 F. 2d 427, 430-2 (9th Cir. 1955), cert. denied 350 U. S. 915; *Emich Motors Corp. v. General Motors Corporation,* 181 F. 2d 70, 83-4 (7th Cir. 1950).

CONCLUSION.

Respondent Schultz accordingly submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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March 31, 1966.

RESPONDENTS' APPENDIX.

ORDER AND DIRECTION FOR JUDGMENT

Sur Motions Under FR 50(b) and for a New Trial.

AND NOW, to wit, this 7th day of November, 1962, upon consideration of defendants' [Samuel Schultz & Co. and Pennsylvania Paste Company] motions to vacate and set aside judgment in favor of plaintiff, for judgment notwithstanding the verdict, in accordance with defendants' motions for a directed verdict pursuant to FR 50(b) of the Federal Rules of Civil Procedure, and, in the alternative, for a new trial; and upon consideration of plaintiffs' conditional motion for a new trial as to defendant, Dow Chemical Company, in the event a New Trial is accorded to defendants Pennsylvania Paste Company and Samuel Schultz & Co.; briefs submitted and oral argument had thereon on September 17, 1962, with leave to the parties who so requested to file supplemental and answering briefs, which were actually filed; NOW, upon a careful review and study of the entire record, it APPEARS:

Plaintiffs charged each of five defendants with violations of §§ 1 and 2 of the Sherman Act,[1] and §§ 2, 3 and 4 of the Clayton Act,[2] as amended by the Robinson Patman Act;[3] the trial of this cause commenced on November 28, 1961 and the Jury returned its verdict on March 29, 1962; plaintiffs' case in chief took over 41 trial days, over 5,000 pages of transcript, and in excess of 426 exhibits; and after presentation of plaintiffs' case, motions were made by defendants under FR 50 and FR41(b) of the Federal Rules of Civil Procedure for directed verdicts and dismissal; after full and complete argument by counsel for all parties, said motions were granted as to defendant Empire Wallpaper & Paint Company, and denied as to the other four defendants, the Court filing its Memorandum Opinion with the Clerk of the Court on February 21,

NOTE: Because of the length of the footnotes they have been printed at the end of this order, see page 5b, *infra*.

1962 [the said Opinion consists of 75 typescript pages, discusses the evidence in detail, pointing out "The whole area of plaintiffs' case is pretty thin, but not enough for me to hear the ice cracking"] which noted that the plaintiffs having rested their case in chief it was no time then to weigh and evaluate the disputed evidence because it was not the judge's function in so determining a motion for a directed verdict or for a dismissal; thereafter, defendants' case took over 20 trial days, over 1700 pages of printed transcript, and in excess of 277 exhibits; after rebuttal testimony and the Court's Charge to the Jury (39 typescript pages), the Jury returned its verdict and found defendants Pennsylvania Paste Company and Samuel Schultz & Co. guilty of violations of § 1 of the Sherman Act, but found defendants Dow Chemical Company and Atlas Wallpaper Company not guilty of violation of § 1 of the Sherman Act, and Pennsylvania Paste Company not guilty of the separate charge against it of violation of § 2 of the Sherman Act; $22,000 in damages were awarded as against defendants Pennsylvania Paste Company and Samuel Schultz & Co. for violation of § 1 of the Sherman Act; and subsequently such award was trebled by the Court pursuant to the statute; the motions of the defendants herein, and plaintiffs in support of their conditional motion for a new trial, assign several grounds of alleged errors of law on the part of the Trial Judge in the admission or rejection of evidence, and in the Charge to the Jury; each and every item of alleged error has been critically analyzed and evaluated and after a close review of the testimony, exhibits, the briefs of counsel, the Court concludes there was no prejudicial error in the admission of testimony, rejection of testimony, or manner of submission of the issues in the case to the Jury, or in the Charge of the Court, when taken in full context, for it was an accurate presentation of the law; and, NOW, it FURTHER APPEARS:

As pointed out in the Court's Memorandum Opinion on defendants' motions for directed verdict and for dis-

missal at the close of plaintiffs' case in chief, plaintiffs' case was weak; but now, in evaluating all of the plaintiffs' proofs in juxtaposition to the evidence adduced by defendants and in approaching and evaluating the present motions, the nisi prius Judge is in a position to consider such post verdict motions under FR 50(b) of the Federal Rules of Civil Procedure in the light of *all* the evidence adduced at trial, and he can set the verdict aside, if he thinks it improper, and grant a new trial, or grant judgment notwithstanding the verdict;

And the Court having stated in its Rulings Sur Motions for Directed Verdict and Dismissal that the Motions as to Samuel Schultz & Co. were denied because "evidence has been aduced that Schultz knew of Pennsylvania Paste's illegal aim . . . [and] that Schultz acted in furtherance of it by selling the wall size eliminator purchased from Pennsylvania Paste as being, or being the same thing as, Nix-Size";[4] and the Court having had the additional benefit of hearing all the testimony and re-reading all the evidence, now concludes that:

1. All testimony concerning alleged knowledge of Samuel Schultz & Co. of Pennsylvania Paste's allegedly conspiratorial aim relates to communications between plaintiffs and Samuel Schultz & Co. in or before 1952,[5] and

2. All testimony concerning acts of Samuel Schultz & Co. for 1952-56 period indicates it did nothing more than purchase wall size eliminator from Pennsylvania Paste and end purchases from plaintiffs, and

3. All testimony of alleged sales of Pennsylvania Paste-manufactured wall size eliminator "as being or being the same thing as" plaintiffs' Nix-Size relates to acts in 1956 and 1958,[6] and

4. No evidence has been adduced indicating any plausible or rational motive for Samuel Schultz & Co. to have entered into a conspiracy in the 1952-56 period,

or in any other period alleged by plaintiffs, to force plaintiffs out of business, and

5. No other probative evidence has been introduced linking Samuel Schultz & Co. conspiratorially with Pennsylvania Paste, and

6. Pennsylvania Paste is legally unable to conspire with itself and therefore violate § 1 of the Sherman Act (15 USC § 1),[7] and

7. There has thus been total failure and lack of evidence to prove the essential elements of plaintiffs' case[8] relating to guilt of Samuel Schultz & Co.

AND it further appearing that such substantial portions of the testimony of plaintiff Maurice Dovberg [on the stand over 6 weeks and over 4200 transcript pages] ranged from deliberate obfuscation[9] to deliberate fabrication,[10] and from fantasy[11] to the bizarre,[12] and that said testimony, on the whole, cannot be granted much credence, the Court thus concludes that the jury verdict is against the weight of the credible evidence.

Therefore, it is ORDERED, ADJUDGED and DECREED that motions of Samuel Schultz & Co. and Pennsylvania Paste Company to vacate and set aside the judgment in favor of the plaintiffs for judgment notwithstanding the verdict pursuant to the provisions of FR 50(b) of the Federal Rules of Civil Procedure be and the same are granted; and it is ordered that judgment is hereby granted in favor of said defendants; and it is further

ORDERED, ADJUDGED and DECREED that should the decision herein contained, granting judgment notwithstanding the verdict to defendants, be reversed by an appellate court, this Court alternatively grants defendants' motion for a new trial; and in addition denies plaintiffs' conditional motion for a new trial against defendant, Dow Chemical Company.

PAUL LEAHY,
Senior District Judge.

FOOTNOTES

1. 15 USC §§ 1 and 2.

2. 15 USC §§ 13, 14 and 15.

3. The general nature of this litigation was discussed in the denial of defendants' motions for summary judgment. D. C. E. D. Pa., 195 F. Supp. 337.

4. Rulings, p. 71.

5. For samples, see Tr. pp. 475, 548, 549, 550, 552, 553.

6. Testimony of R. Goldberg, Tr. p. 3454-6; testimony of J. Levy, Tr. p. 4014 through 4016; testimony of R. Applebaum, Tr. p. 4049; testimony of B. J. Dovberg, Tr. p. 4176, 4177; testimony of L. E. Dovberg, Tr. p. 4198; testimony of N. Dovberg, Tr. p. 4215, 4220 through 4226.

7. Union Pacific Coal Co. v. United States, 173 F. 737; Lawlor v. Loewe, 209 F. 721, aff'd 235 U. S. 522; United States v. Reading Co., 183 F. 427, modified on other grounds, 226 U. S. 324; United States v. American Naval Stores Co., 172 F. 455. Cf. Paramount Pictures v. United Motion Picture Theatre Owners, 3 Cir., 93 F. 2d 714.

8. See, Morris Brothers Lumber Co. v. Eakin, (CA 3) 262 F. 2d 259, 263.

9. The following colloquy is selected merely as a sample:

Q. Your closing inventory in 1950 by your return was $630, wasn't it?

A. That's what the accountant showed.

Q. By your return, isn't that right?

A. Yes.

Q. And your testimony as I recall it was that the reason you have $630 there is because that's what your accountant told you to put in; is that right?

A. That's what the accountant put in.

Q. Right. And your opening inventory for 1951 was $630, was it not?

A. Yes.

* * *

Q. What was your closing inventory at the end of 1951 as you estimated it?

A. When I took an actual inventory?

Q. Yes. You said you didn't take an actual inventory, so what was your closing inventory at the end of 1951 as you estimated it?

A. I didn't take an inventory at the end of '51.

Q. What was it as you estimated it?

Footnote 9, continued

A. About the same, or about——
Q. What was it as you estimated it?
A. Let me see that return.
Q. Of course. Take all of them.
A. I would have estimated that my inventory was somewhat less.
Q. What was it as you estimated it, Mr. Dovberg?
A. About——

MR. MONTEVERDE: When you say "estimated," you mean on the income tax returns?

MR. MATZ: No, he gave an estimate. He told us that he had an estimate of his closing figures as of the end of 1951 and I am asking him what it was.

MR. MONTEVERDE: You are talking about 1950?

MR. MATZ: I am talking about 1951.

A. I estimated I had about $500 worth of inventory less than what I had previous.
Q. Would you please tell us what was your estimate of your closing inventory as of the end of 1951?

* * *

Q. I will ask the witness again, what was your closing inventory as you estimated it as of the end of 1951?
A. The over-all inventory as to what it actually was? I did not take an inventory.
Q. I ask you again what did you estimate to be your closing inventory as of the end of 1951.
A. The accountant showed $100.
Q. I ask you again, what did you estimate to be your closing inventory as of the end of 1951?
A. About $500 or so less than what it was the year before.
Q. Will you name the figure?
A. $530.
Q. Would you name the figure that you estimated to be your closing inventory as of the end of 1951?

MR. MONTEVERDE: 1951.

MR. MATZ: That's what I said. I have been saying it for the last ten minutes.
A. $100.

By MR. MATZ:—

Q. Now, you tell us now that you estimated your inventory at the end of 1951 to be $100; is that right?
A. No, I didn't estimate it. The accountant showed $100 because I told him that I estimated that my inventory might be about $500 or so less than what it was the previous year, and so he put $100 down there.

Footnote 9, continued

Q. And so he put $100 down there. And I come back to my question again, what was the inventory that you estimated you had on hand at the end of 1951?

A. I didn't estimate the total inventory that I actually had on hand. I estimated that I had about $500 less than I had the previous year.

Q. Well, how could you do that without knowing what you had on hand?

A. Because that's what I estimated that I had less. I had made purchases during that year.

Q. Will you answer my question?

A. And I had replenished——

MR. MONTEVERDE: Just a moment, please, Mr. Dovberg, we want to get this over promptly and he is entitled to a responsive answer. That can be answered very shortly Now, would you read the question back?

[The question was read.]

A. Then I don't know.

* * *

A. Well, the accountant asked me, "Do you have more or less inventory than——"

By MR. MATZ:

Q. Will you answer my question, please?

A. I didn't——

Q. How would you know that you had about $500 less without checking your inventory?

A. I didn't know but I estimated, sir.

Q. How did you estimate it?

A. Because I felt that I had less inventory by possibly about $500. I knew we had a comparable inventory.

Q. Mr. Dovberg, I have now asked you several times, how did you know you had $500 less at the end of the year?

A. That was an estimate.

Q. How did you arrive at that estimate?

A. The accountant asked me and that's what I said. I said, "We have about $500 less inventory than what we had——"

Q. How did you arrive at that figure of $500?

A. It was just an estimate.

Q. How did you make that estimate? Couldn't it just as well have been $2000 or $200?

A. It could have.

Q. Then why did you make it $500 if it could have been $200 or $2000?

A. That's what I told the accountant and on the basis of that he put down $100.

Q. In other words, you are telling us now this $500 had no basis in fact?

Footnote 9, continued

A. No, I told the accountant that I believed that I had less inventory by about $500.

Q. And now we come back to the question again.

A. And this was—that's what I assumed.

Q. And how did you arrive at that figure of $500?

A. The accountant asked me and that's what I told him.

Q. I didn't ask you how you arrived at telling the accountant; I asked you how you arrived at that figure of $500.

A. I guessed.

* * *

[Tr. pp. 3283-3289]

10. Another example refers to partnership tax returns filed by plaintiffs and utilized by them in making PX 242A (Tr. p. 1103):

Q. Now, I show you your 1951 partnership return. You have already testified that the opening inventory in that return is incorrect, haven't you?

A. Yes.

Q. Is the closing inventory correct?

A. No.

Q. What is wrong with the closing inventory?

A. It is incorrect.

Q. Well, what is wrong with it?

A. I had a much more substantial inventory.

Q. When?

A. I had—in—by the end of 1951.

Q. Did you take inventory at that time?

A. No, I did not.

Q. Then why did you put in $100 as closing inventory if as you now state you had much more inventory?

A. The accountant used that as a figure.

Q. You mean he put the figure in and you had nothing to do with it?

A. The accountant put in that figure. I revealed to him that I had not taken inventory, that my time was too consuming, that it was an enormous job for me to suddenly stop and spend several days just taking inventory to come up with an honest and accurate figure, and I told him that I had not taken inventory and on the basis of that the accountant used $100.

Q. You knew it was more than that?

A. I did.

Q. Did you know how much more?

A. No, I did not.

* * *

Q. So you now state that you knowingly filed an improper return for 1951. Is that right?

A. As far as the inventory is concerned, Mr. Matz, yes.

Q. Both opening and closing. Is that right?

A. Yes.

Footnote 10, continued

Q. Now, let us go to 1952. Look at that one. Is that opening inventory correct?

A. No.

Q. Is the closing inventory correct?

A. No.

Q. Did you know it to be incorrect when you signed that return?

A. Yes.

* * *

Q. Why didn't you tell your attorney that they were incorrect?

MR. MONTEVERDE: Well, I object to that as argumentative and also embodying two questions in one.

THE COURT: Please reframe the question.

MR. MONTEVERDE: I think you should first ask whether he told his attorney.

MR. MATZ: Did he?

MR. MONTEVERDE: He certainly did.

MR. MATZ: At the time they were offered in evidence?

MR. MONTEVERDE: Certainly.

* * *

Q. Did you know they were incorrect when they were offered in evidence?

A. Yes.

Q. When you gave these returns to your attorney, did you tell him they were incorrect?

A. Yes.

Q. When was that?

A. When I gave my attorney the returns.

* * *

Q. Now, do you know what the opening inventory should have been as of January 1, 1953?

A. No, if I do, I would have put it down there, Mr. Matz.

* * *

Q. What is it on there?

A. It says $561.

Q. That was the closing inventory in your tax statement; is that right?

A. That's the figure the accountant used, yes.

Q. Now, where did he get that figure?

A. He just put it down.

Q. You mean he pulled these figures out of the air and then you signed the return?

Footnote 10, continued

A. [redacted], prior to filing the income tax return, I discussed this with my accountant and I explained to him that I had not taken an inventory and that I did not know a figure, an actual figure, for inventory and the accountant said to me, "Well, we will use that figure," and that's what he did.

Q. You mean he just came up out of the air and gave you $561, is that it, as an inventory figure?

A. He seemed to give me the impression that there was nothing wrong, that generally this is done . . .

* * *

[Tr. pp. 3053-3057; 3070-3071]

11. Another example:

Q. Well, now, did you have a party by the name of P. Davis in charge of your research division?

A. I had an associate at one time who came into the factory and worked from my factory, J. Davis.

Q. J. Davis is it?

A. Yes.

Q. And he worked for you?

A. No, he didn't work for me. It was an acquaintance that I had made, and this fellow used to come into the factory and use my office facilities, and I considered him an associate but he had nothing to do with the business.

* * *

Q. Did he ever sign any letters for you as Mr. Monteverde just told you?

A. Yes.

Q. Now, I thought you said he was just an acquaintance of yours, that he had nothing to do with the business.

A. He had nothing to do with the business.

Q. Didn't he transact business for you?

A. You mean as far as signing letters?

* * *

Q. He signed letters for you?

A. Yes.

Q. Why did he sign letters for you?

A. Because I had him sign letters.

Q. Did he write the letters, dictate them?

A. No. I wrote the letters.

Q. You wrote the letters?

A. Yes.

Q. Did you pay him?

A. No.

* * *

Q. When was Mr. Davis associated with your company?

A. From the beginning of the business until the end of the business, Mr. Obert.

Footnote 11, continued

Q. And by the beginning when do you mean?

A. From the very inception of that business until the business ended.

* * *

[Counsel thereupon showed Mr. Dovberg letters from Dovberg's corporation, signed J. Davis, and Mr. Dovberg stated he had signed them himself.]

* * *

Q. Why would you put J. Davis, and why would you sign his name to that letter?

A. Because I was J. Davis.

Q. Who else are you, anybody else so that we know?

A. No. You see, Mr. Obert, I am under oath. You are asking me questions. So, I am telling you J. Davis was associated with me in business from the very inception to the very end, and when I wrote as of J. Davis I sign J. Davis' name if I decided I didn't want to use my name I used J. Davis' name. If there is anything wrong with that you tell me and I am willing to suffer the penalty. I was J. Davis in this instance. . . .

* * *

Q. Did you in the course of your business from 1950 through 1957 use any other name beside J. Davis?

A. Jerome Davis.

Q. You used Jerome Davis?

A. Yes.

Q. You went under that name?

A. Yes.

Q. Why?

A. If I ever wrote a letter and I decided not to use, my name I used Jerome Davis, J. Davis.

Q. Why wouldn't you sign your own name to matters pertaining to your own business, Mr. Dovberg?

A. In instances where I felt that I didn't want to identify myself with the business.

Q. Well, why wouldn't you want to identify yourself with your own business?

A. That is the only thing I can tell you, Mr. Obert. That is the only answer.

* * *

Q. Can you give us any reason why you would have signed that letter J. Davis?

A. No other reason except that I already gave you that if I ever corresponded and I didn't use my name, or decided not to use my name, I signed it J. Davis.

Q. But you can give no more specific reason why you would use another man's name than you have given us that you just decided sometimes you didn't want to use your own name. Is that right?

Footnote 11, continued

A. That's correct.

* * *

Q. Where does J. Davis live?

A. I will retract that statement. There was no J. Davis.

Q. You mean there was no Mr. J. Davis that ever was associated with you?

A. No.

Q. And you told this Court under oath less than ten minutes ago to the contrary?

A. I corrected my statement, and I said that under oath I signed J. Davis.

Q. And didn't you say Mr. J. Davis used to come there and work with you from 1950 through 1956?

A. J. Davis was associated with my business from the inception until the end because I made it so. That is what I said.

Q. You mean J. Davis lives in your mind as a reality?

A. No.

Q. No?

A. No.

* * *

[Tr. pp. 2305-2314]

12. Another example:

Q. I show you Exhibit D-148 that has a similar type of designation after the number. In this instance "L" appears before it and the numeral "66" is typed after it. What does that mean?

A. No significance.

Q. It has no significance at all?

A. No.

Q. Why is it put there if it has no significance?

A. Because I just put it there when I typed the invoice.

Q. Is that like Jerome Davis?

A. Yes, it could have been.

Q. Well now, you told us about Jerome Davis eventually. Why not tell us why you put "66" after the number.

A. It has no significance.

Q. Well, I show you the next one, D-154, and that has "L" before it and "99" after it. Why is that?

A. That has no significance.

Q. And there are numerous invoices here, all containing similar designations; right?

A. Yes.

Q. And they have no significance?

A. Absolutely no significance.

Q. "L" couldn't stand for ledger, could it?

A. No.

Q. Did you have a ledger of your accounts?

A. No.

Footnote 12, continued

Q. Do you swear under oath you never kept a ledger?

A. I swear under oath I never kept a ledger. My uncle's name was Louis.

Q. You swear your uncle's name was Louis? What has that to do with it?

A. My uncle's name was Louis and my uncle had passed away and I preceded the invoice numbers with the letter "L" for Louis.

Q. In memoriam of Louis?

A. Well, yes. Otherwise they had no significance.

Q. Did you memorialize Louis in any other way, so that we know for the purpose of this case?

A. No, not yet.

Q. When had Uncle Louis passed away?

A. By the end of 1951.

Q. When?

A. By the end of 1951.

Q. And you never used the designation "L" to memorialize your uncle before 1951 then; is that your testimony?

A. To the best of my recollection.

Q. Then what were the numbers after? Why did you put the numerals 66 and 99 and so forth after it?

A. They didn't mean a thing.

Q. Well, you first told us the "L" meant nothing. Then you told us the "L"——

A. Well, it had no relationship to this case and so for that matter it would be insignificant, Mr. Obert.

[Tr. pp. 4878-4881.]